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In re Wai'ola 0 Moloka'i, Inc., 83 P.3d 664 (Haw. 2004)

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judgment of the facts for the ALJ's judgment regarding whether a violation of the anti-degradation regulations occurred. The ALJ's decision must be upheld unless clearly erroneous, and the court held that the ALJ made sufficient factual findings to support its ruling. Therefore, the court reinstated the ALJ's finding that no violations of the anti-degradation regulations occurred.

Next, the Association claimed the permit should include limits on mercury. The court affirmed the trial court's decision not to require limits for mercury in the permit, stating NPDES permits only limit pollutants that may possibly cause harm. Specifically Gwinnett presented expert testimony at the ALJ hearing showing (1) no mercury present in the influent coming into the treatment plant, (2) the plant could reduce any mercury that may appear in the influent to safe levels, and (3) if testing ever detected mercury in the effluent then the EPD would impose mercury limits.

The Association also claimed that the limits for phosphorus and fecal coliform would not protect Lake Lanier's designated uses of swimming and fishing. The court held that the limits for phosphorus and fecal coliform stipulated in the permit complied with all water quality regulations, and the Association's claim lacked support by any evidence in the record. Therefore, the court of appeals reversed the trial court rulings concerning public notice and anti-degradation regulations, and affirmed the trial court's findings relating to effluent limits of mercury, phosphorus, and fecal coliform.

David B. Oakley

HAWAII

In re Wai'ola O Moloka'i, Inc., 83 P.3d 664 (Haw. 2004) (holding although private commercial real estate developer's proposed economic development plan constituted a "reasonable-beneficial" water use, Commission on Water Resource Management properly denied developer a water use permit pursuant to common law and statutory authority).

The Department of Hawaiian Home Lands ("DHHL"), the Office of Hawaiian Affairs, ("OHA"), and other individuals appealed directly to the Supreme Court of Hawai'i, challenging a Commission on Water Resource Management ("Commission") decision granting Wai'ola O Moloka'i ("Wai'ola") and its parent company Moloka'i Ranch, Ltd. ("MR") (collectively "MR-Wai'ola") a water use permit and authorizing the Commission chairperson to issue well construction and pump installation permits. DHHL, OHA, and the others argued (1) the Commission erred in finding that MR-Wai'ola satisfied the requisite conditions for obtaining a water permit for a "new use"; (2) the Commission's decision violated the State's duty to protect DHHL's

water rights pursuant to the Hawai'i Homes Commission Act ("HHCA"), the Hawai'i State Constitution, and the State Water Code ("Code"); (3) the Commission erred in interpreting the four-year "use it or lose it" provision in section 174C-58(4) of the Hawai'i Statutes as an enforcement tool instead of a planning tool, and abused its discretion by finding the facts of matter warranted allocating water for use beyond a four-year period; (4) the Commission erred in granting an "interim" permit for a "new" use vis-à-vis an "existing" use; and (5) the Commission erred in finding MR had correlative rights to transport groundwater outside the watershed of origin.

MR-Wai'ola owned approximately one-third of the land on the island of Moloka'i. Wai'ola was a domestic water purveyor that operated as a public utility, as approved by the Hawai'i Public Utilities Commission. As of 1998, Wai'ola supplied water to the western part of Moloka'i, roughly one-sixth of the island's population. Although Wai'ola owned and operated transmission and distribution systems across Moloka'i, it did not control any source of potable groundwater on the island. To serve its customer base, Wai'ola purchased potable water from DHHL, Maui County ("County") and Kukui, Inc. ("Kukui"), all of which operated wells located in the Kualapu'u aquifer system.

MR developed a thirty-year revitalization plan to stimulate Moloka'i's economy premised upon (1) maintaining and capitalizing on Moloka'i's rural character and vast open space; (2) increasing and diversifying economic activities for Moloka'i residents in the areas of agriculture, tourism, and light industry; and (3) protecting and promoting the physical and cultural environment unique to the island of Moloka'i. To effectuate its plan, MR applied for a water use permit on behalf of Wai'ola. MR requested 1.25 million gallons per day ("mgd") of groundwater from the Kamiloloa aquifer system to accommodate its current and future domestic, commercial, industrial, and municipal needs. Specifically, MR sought approximately 220,000 gallons per day ("gpd") to serve its current needs on western Moloka'i in the event DHHL and Kukui discontinued purchase agreements with Wai'ola, and 0.1 mgd for the ongoing development of MR's land over the next fifteen to twenty years.

On May 21, 1996, the Commission approved the water use permit for MR's Kamiloloa well, subject to reductions in water amounts previously allocated to other parties. The Commission mandated that (1) DHHL reduce its water use by 14,000 gpd; (2) Maui Department of Water Supply reduce its water use by 85,910 gpd; and (3) Kukui reduce its water use by 19,952 gpd. DHHL filed a timely petition for a contested case hearing on MR's approved permits on October 3, 1996, alleging that MR-Wai'ola's proposed well would adversely affect DHHL's interests. The Commission determined that DHHL had standing to contest the permits. Additionally, through a separate hearing, the Commission granted standing to OHA, the County, individuals who either resided on land within the Kamiloloa aquifer system or had property interests in Kamiloloa, and native Hawaiians

who claimed traditional and customary gathering rights pursuant to pre-1778 Hawaiian law.

At the contested case hearing, the Commission limited DHHL, OHA, the County, and the others to discussing the effect of the proposed Kamiloloa well on the two adjacent aquifers (Kualapu'u and Waikolu) and the effect of the proposed well on the nearshore environment. The first issue addressed whether (1) MR-Wai'ola's proposed water use constituted a "reasonable use" and was permissible under state common law; (2) the proposed use was consistent with the public interest and the quantified effect of groundwater pumping on stream flow and nearshore waters; and (3) any party had appurtenant or riparian rights, or any other right to a quantifiable amount of water equal to or having priority over the proposed use. Regarding the second issue, the Commission addressed the conditions that it would impose upon MR-Wai'ola's water use in the event it granted the water use permit.

The Commission issued its proposed findings of fact ("FOF"), conclusions of law ("COL"), and decision on August 19, 1998. After reviewing written exceptions submitted by DHHL, OHA, the County, and the others, the Commission issued its final decision on December 28, 1998. The Commission concluded, *inter alia*, that MR-Wai'ola's proposed water use constituted a reasonable-beneficial use sufficient to warrant an "interim water use permit" for MR-Wai'ola's proposed Kamiloloa well. Following this decision, DHHL, OHA, the County, and the others collectively appealed the Commission's decision to the Supreme Court of Hawai'i.

On appeal, the supreme court first addressed the extent to which reservations of water preclude applicants for "new" water use permits from satisfying the requisite conditions to obtain such permits. Specifically, the court reviewed the Commission's finding that a "reservation" of water did not constitute an "existing legal use" for purposes of the Code and the Commission's decision that DHHL's reservations were aquifer-specific and thus, as a matter of law, MR-Wai'ola's application for a water use permit in the Kamiloloa aquifer system did not interfere with DHHL's reservation in the Kualapu'u aquifer system.

Pursuant to section 174C-5, the Commission administers the Code and can adopt and enforce rules as necessary to facilitate Code administration. The court stated it would defer to the Commission's interpretation of its own rules unless that interpretation is plainly erroneous or inconsistent with the underlying legislative purpose. The Commission also formulates a "Hawai'i water plan" to protect, manage, and conserve the state's water. Here, the court found that the Commission had authority to limit reservations of water to specific aquifers, as the Commission administers the Code and determines the contents of the Hawaii water plan and the Commission's interpretation of its rule was not erroneous or inconsistent with the legislative purpose.

However, the court stated that pursuant to sections 174C-49(a)(7)

and 174C-49(e), MR-Wai'ola's proposed water use could not interfere with DHHL's water rights, as any permit issued by the Commission was subject to DHHL's rights. As such, MR-Wai'ola had the burden of establishing that its proposed water use in the Kamiloloa aquifer system would not interfere with DHHL's water reservation in the Kualapu'u aquifer system, and that the Commission had a duty to hold MR-Wai'ola to this burden.

The court continued its analysis of this first issue by holding that a water reservation does not constitute an existing legal use. The court found statutory language and language from the Hawai'i Administrative Rules specifically distinguishing a water "reservation" from an "existing legal use." However, the court also noted that separate statutory authority protected DHHL's reservation rights.

Lastly, in balancing competing interests for water use permit applications, the court considered whether water reservations constituted a public trust purpose requiring Commission protection. The court has long recognized the heightened duty owed to native Hawaiians, including their water rights. Consistent with this duty, the court held that a water reservation constituted a public trust purpose and that the Commission bore a duty to protect the interests of native Hawaiians in balancing competing interests for water use permits. Because water reservations effectuated the State's public trust duty to "ensure the continued availability and existence of its water resources for present and future generations," such reservations were entitled to the constitutional protections given to public trust purposes.

In holding that water reservations constituted a public trust purpose, the court next addressed whether the Commission discharged its public trust duty to protect DHHL's water reservations in the Kualapu'u aquifer. Although the court acknowledged a presumption of validity for agency decisions affecting public trust resources, reasonably clear FOFs and COLs premise this presumption. In this case, the court found no FOFs regarding whether MR-Wai'ola established that its proposed use would not interfere with DHHL's reservation in the Kualapu'u aquifer, as required by the Code. The court thus held that the Commission incorrectly concluded that MR-Wai'ola did not need to meet its burden of proving its use would not interfere with DHHL's reservation because DHHL had a reservation in Kualapu'u aquifer and MR-Wai'ola sought use of Kamiloloa water. The Commission thereby violated the public trust doctrine, the Code, and the Hawai'i Constitution by failing to render proper FOFs and COLs determining whether MR-Wai'ola satisfied its burden of proof. As such, the court held the Commission did not adequately discharge its duty to protect DHHL's reservation in the Kualapu'u aquifer.

Although the court held that the Commission did not discharge its duty with respect to DHHL's water reservation, it found that the Commission did satisfy its public trust obligation to protect DHHL's existing legal uses of the Kualapu'u aquifer. Specifically, the Commission adequately protected DHHL's existing wells against the competing uses proposed by MR-Wai'ola. The court stated that the

Commission had a duty to “consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact.” Here, the Commission addressed the potential impact of MR-Wai’ola’s proposed Kamiloloa well on DHHL by (1) considering two hydrological studies in rendering its FOFs and COLs, (2) granting MR-Wai’ola a water use permit for approximately one-half of the requested water amount, and (3) proposing a municipal reservation in the Kamiloloa aquifer system that would be set up for municipal uses as defined in the Code. The court therefore concluded that the Commission sufficiently protected DHHL’s interest in its existing wells.

The court secondly addressed whether the Commission erred in finding that MR-Wai’ola satisfied the requisite conditions to obtain a water use permit. In Hawai’i, the Code’s permitting provisions control issuance of use permits with respect to water management areas (“WMA”). Because the Commission designated the entire island of Moloka’i as a WMA, the Code governs all applications for water use on the island. Pursuant to statute, a “new,” as opposed to “existing,” use of water is required to obtain a water permit. Furthermore, under the Code and the public trust doctrine, permit applicants have the burden of justifying their proposed uses in light of protected public rights. To determine whether the Commission erred in concluding MR-Wai’ola had met its burden of proof, the court considered each relevant element of the prevailing statute separately.

Within this analysis, the court first addressed whether MR-Wai’ola established in its permit application that the water source, here a groundwater body, could accommodate MR-Wai’ola’s proposed water use. The Commission concluded that the Kamiloloa aquifer system could accommodate MR-Wai’ola’s proposed use because there was unallocated water in the aquifer and DHHL had no reservations in Kamiloloa water. The court stated that because water reservations are aquifer-specific, the sustainable yield of a particular aquifer is also aquifer-specific. Having noted this, the court held that the Commission did not clearly err in finding that the Kamiloloa aquifer could accommodate MR-Wai’ola’s requested allocation.

The court next considered whether the Commission erred in finding that MR-Wai’ola’s proposed water use would minimally affect DHHL’s Kualapu’u wells. Specifically, the court reviewed the Commission’s refusal to consider the effect on DHHL’s interest because DHHL’s wells were in the Kualapu’u system and MR-Wai’ola proposed to construct wells only in the Kamiloloa system. Upon reviewing the entire record, the court concluded that the Commission did not clearly err in finding that MR-Wai’ola established its proposed water use in Kamiloloa would not interfere with DHHL’s existing wells in Kualapu’u.

Third, the court addressed whether MR-Wai’ola’s application established that its proposed use was a reasonable-beneficial use consistent with state and county land use plans and designations, and was consistent with county land use plans and policies. Pursuant to

statute, a "reasonable-beneficial use" is "the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, in a manner [that] is both reasonable and consistent with the state and county land use plans and the public interest." To establish a reasonable-beneficial use, water permit applicants must, at a minimum, prove their water needs and demonstrate the absence of plausible mitigating measures. The court reviewed the record and found evidence sufficient for the Commission to conclude that MR-Wai'ola's proposed use constituted a reasonable-beneficial use of water. The court thus held that the Commission did not clearly err in finding that MR-Wai'ola met its burden of establishing a reasonable-beneficial use of water.

Lastly, the court reviewed whether the Commission erred in finding MR-Wai'ola met its burden of establishing that its proposed use of water would not interfere with DHHL's rights. Upon reviewing the record, the court found the FOFs failed to address whether MR-Wai'ola offered sufficient evidence to satisfy its burden. Moreover, the court found COLs that suggested the burden was on DHHL to establish that MR-Wai'ola's proposed use would not interfere with DHHL's reservation rights. This was directly contrary to the court's well-settled interpretation of an applicant's burden under the Code, for purposes of a "new" use. Because the Commission made no FOFs or COLs establishing whether MR-Wai'ola met its burden of proving its proposed use would not interfere with DHHL's rights, the court remanded the matter back to the Commission to make FOFs and COLs regarding this issue.

The third issue the court addressed was whether the Commission misinterpreted section 174C-58(4) as an enforcement tool instead of a planning tool. OHA argued the Commission erred in granting MR-Wai'ola a water permit for water it would not use within four years of the permit's issuance. OHA further argued that, even if the Commission had statutory authority to issue MR-Wai'ola a water permit for nonuse beyond a four-year period, it erred in finding good and sufficient reasons for doing so.

The court construed section 174C-58(4) to permit, rather than mandate, suspension or revocation of water use permits based on partial or total nonuse. Furthermore, the language of section 174C-58(4) explicitly allowed the Commission to enter into written agreements where any period of nonuse may apply toward the four-year revocation period. As such, the court stated that section 174C-58(4) was an enforcement tool by which the Commission could revoke or suspend a water use permit upon knowledge that the permitted allocation of water, which the Commission expected the permit applicant to use within four years, was unused. Moreover, the court found a Commission COL in the record that supported the court's interpretation of section 174C-58(4). The court therefore held that the Commission did not abuse its discretion in allocating water for future uses beyond a four-year period to MR-Wai'ola because the Code and the Hawai'i water plan saw a long-range comprehensive syllabus

for Hawaii's water resources and the record supported the Commission's conclusion that the fifteen-to-twenty years necessary to implement MR-Wai'ola's development plan warranted a water allocation in excess of four years.

The court next addressed whether MR-Wai'ola could transport water outside the water's aquifer of origin. The Commission found that MR-Wai'ola, by virtue of owning land in the Kamiloloa aquifer system, had correlative rights to transport water from Kamiloloa to various service areas outside of Kamiloloa. However, court precedent established that relevant Code provisions, and not the common law doctrine of correlative rights, applied to WMAs. Because the entire island of Moloka'i was a WMA, the correlative rights doctrine was inapplicable. As such, the court held the Commission erred in concluding that MR-Wai'ola had correlative rights to Kamiloloa water. The court noted that even if MR-Wai'ola had correlative rights, such rights did not extend to transporting groundwater outside the Kamiloloa aquifer system. The court remanded this issue back to the Commission, stating that MR-Wai'ola had a right to transfer water outside the watershed of origin pursuant to a validly issued water permit and statutory authority. The Commission could allow MR-Wai'ola to transport water outside the Kamiloloa aquifer if the Commission found, as it did in this case, that such use was consistent with the public interest and the general land use plans and policies of the state and counties.

Lastly, the court considered whether the Commission erred in granting MR-Wai'ola an "interim" water use permit for its proposed future uses. Pursuant to statute, the court found that the Commission could issue interim permits only for "existing legal uses," and not for "new uses." The court found in both the Commission's FOFs and MR-Wai'ola's answering brief that MR-Wai'ola's application sought a "new" use of water. Moreover, the court was unable to find in the record any justification for the Commission's issuance of the interim permit. Although MR-Wai'ola proposed both "existing" and "future" uses of aquifer water, its water use nonetheless sought to establish a new groundwater source from which to make such uses. As such, the court held the Commission incorrectly granted MR-Wai'ola an interim water use permit.

Ultimately, while the court upheld some of the Commission's decisions, it reversed others. Thus, the court vacated the Commission's decision and remanded the case back to the Commission for further proceedings.

Kyle K. Chang